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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED, A B & C MOTOR TRANSPORTATION COMPANY, INC., M & M TRANSPORTATION COMPANY,

Plaintiffs,

and

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,

Intervening Plaintiff,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,

Defendants,

and

SCHENLEY INDUSTRIES, INC., LENOIR CHAIR COMPANY, INC., NATIONAL COUNCIL OF PRIVATE MOTOR TRUCK OWNERS, INC., PRIVATE CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

Intervening Defendants

STATEMENT AS TO JURISDICTION

(Filed December 18, 1950)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiffs-appellants submit

herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court of the United States for the Eastern District of Virginia, Richmond Division, is reported only in 7 Federal Carrier Cases, paragraph 80, 614, p. 2382. A copy of the opinion and the judgments of October 21 and November 17, 1950, are attached hereto as Appendix A.

Jurisdiction

This is an action to set aside two orders of the Interstate Commerce Commission brought under Title 28, United States Code, sections 1336 and 2321-2325, inclusive. The final judgment of the District Court was entered on October 21 or November 17, 1950. A petition for appeal is presented to the District Court herewith on this 18th day of December 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Schenley Dist. Corp* v. *United States,* 326 U. S. 432; *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634; *United States* v. *Hancock Truck Lines,* 324 U. S. 774; *United States* v. *Detroit & Cleveland Nav. Co.,* 326 U. S. 236; *American Trucking Associations* v. *United States,* 326 U. S. 77; *Rochester Teleph. Corp. v. United States,* 307 U. S. 125.

Question Presented

Is a non-carrier business or enterprise a common or contract carrier by motor vehicle as defined in and, therefore, subject to those provisions of part II of the Inter-

state Commerce Act regulating common and contract carriers by motor vehicle, or is it a private carrier by motor vehicle as defined in and, therefore, not subject to such provisions, with respect to motor vehicle operations conducted by it in the transportation to its customers of property manufactured and sold or for sale by it for which transportation it makes and receives a charge or compensation, direct or indirect, comparable in rate and amount with that of common carriers by rail or motor vehicle; and which motor vehicle operations are also employed by it in the transportation, on return trips, of materials and supplies to its own plant or place of business or those of its subsidiaries for use in the manufacture of products?

More succinctly, though less comprehensively, the question may be put thus: May a manufacturer or merchant engage in the transportation by motor vehicle for compensation of goods of which he is the seller in furtherance of the sale thereof without assuming the status of a common or contract carrier as defined in § 203(a)(14) and (15), and complying with the provisions of part II of the Interstate Commerce Act applicable to such carriers?

All the points raised in the Assignment of Errors are also presented. The Question Presented, as stated above, sets forth the major issue.

Statutes Involved

Section 203(a)(14)(15)(17) (49 U.S.C. § 303(a) (14)(15)(17)) of the Interstate Commerce Act, as amended, and the National Transportation Policy prefacing said Act are copied in Appendix B.

Statement

The facts respecting the motor carrier operations involved are stated by the Commission in its reports (48 M.C.C. 259 and 405; 51 M.C.C. 65) upon which the orders

here assailed are based are not in dispute. The reports are attached to the Complaint as exhibits E, I, and G. The following facts are drawn from the reports.

Appellee, Lenoir Chair Company, Inc., henceforth called Lenoir, manufacturers furniture at Lenoir and Newton, N. C. Since 1929 it has transported a portion of its products in its own trucks from said points to its customers in some 15 States and, on return, whenever possible, materials and supplies to and for use in its factories. Its status as a carrier having been questioned, and to secure a determination of its status as a motor carrier under the Interstate Commerce Act, it filed with the Commission an application under § 209 of the Act for a permit authorizing the continuance as a contract carrier of the above mentioned motor carrier operations in which it was engaged. Conceiving that such operations were those of a private carrier and as such not subject to the provisions of the Act except those relating to safety of operations, hours of service of employees, and standards of equipment, Lenoir concurrently filed therewith a motion for dismissal of the application and accordingly made no effort to establish that such operations are required by the public convenience and necessity or that they would be consistent with the public interest and the national transportation policy.

In its transportation activities it operates 5 trucks in long-distance hauling and 6 or 7 in interplant service. It transports and desires to transport outbound only its finished furniture to its customers and inbound only materials and supplies used by it in its factories. Between 15 and 20 percent of its annual production, approximating $3,000,000, has been transported in its own trucks, the balance by rail and motor common carriers. The possibility of a return haul of supplies influences to some extent its determination whether it will transport outbound shipments

in its own vehicles to particular destinations, but in many instances its vehicles return empty. Lenoir claims, however, that this consideration is not absolutely controlling because considerations such as the needs of its customers, the availability of for-hire carriers, the expedition of delivery and good will are also given weight.

Sales are f.o.b. factories and, when delivery is made in its own vehicles, it adds to the factory price a transportation charge, separately shown on its invoice, comparable to the charges of rail or motor carriers which are also used to the same destinations. This is done so that delivery price at destination will be the same as that when the furniture moves by a carrier for hire and "so as not to be unfair competition to any other carrier."

Materials and supplies are usually purchased f.o.b. origin, and sometimes a freight allowance is made by the supplier.

Lenoir maintains an account reflecting income and expenses incurred in its truck operations. On outbound shipments the amount collected, equal to the motor carrier or rail rate is shown. The record does not show whether the income account includes a credit for the return transportation of plant supplies, except for the occasional freight allowances. For the year ending June 30, 1946, its trucks traveled 205,020 miles, truck revenues amounted to $28,874, expenses to $47,619, and loss in truck operations were $18,746.

It does not hold itself out to the general public or to anyone as a common carrier by motor vehicle nor are its services available to anyone as a contract carrier under individual contracts or agreements.

Appellee, Schenley Industries, Inc., formerly named Schenley Distillers Corporation, henceforth referred to as Schenley, owns a number of subsidiary corporations

engaged in the manufacture of alcoholic liquors or accessories used in such enterprises.

Prior to April 1946, some of the transportation of products outbound from and some of the transportation of materials and supplies inbound to the plants of the various subsidiaries were performed by Schenley Distilleries Motor Division, a separate corporate subsidiary set up for that purpose. For such service, Motor Division was paid by the other subsidiaries and Schenley a fixed amount each week for each truck used and a charge of 10 cents per truck mile. To secure a determination of its status as a private carrier, Motor Division filed with the Commission and prosecuted an application for a permit authorizing operation as a contract carrier. The application was denied upon a finding that its motor vehicle operations were those of a contract carrier and that the consistency thereof with the public interest, etc., had not been established (44 M.C.C. 171). The district court for the District of Delaware agreed with the Commission and the Supreme Court affirmed. *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432.

Thereafter, in April 1946, Schenley, in the belief that it would be a private carrier as defined in § 203(a)(17) of the Act, instituted the motor carrier operations here in question. On May 7, 1946, it filed with the Commission an application under § 209 of the Act for a permit authorizing such operations as a contract carrier by motor vehicle of alcoholic liquors and materials and supplies used in their manufacture and sale between all points in 15 States. This was done solely for the purpose of securing a determination of its status under the Act and no attempt was made to prove that the operations would be consistent with the public interest and the national transportation policy.

It owns 32 tractors, 31 trailers and a service truck for

which it maintains garage and maintenance facilities at Lawrenceburg, Ind., near the plant of one of its subsidiaries. At the time of the hearing before the Commission in September 1946, Schenley's motor operations were confined to service to and from such plant but it intends to operate to and from other of its subsidiaries.

From facts of record, the Commission estimated that in 1946 Schenley handled less than .05 percent of the traffic moving to and from this plant.

Schenley purchases and takes title to the entire output of case liquors of its subsidiaries at the distilleries at a price consisting of the entire cost of manufacture plus tax and resells at a higher price. Cost of manufacture includes charges for inbound transportation of materials and supplies. Outbound transportation to its purchasers of liquor sold by Schenley is accomplished by rail and motor common carriers and in part by Schenley's trucks. When transported by common carrier, it is sold f.o.b. origin, and when transported by Schenley, it is sold f.o.b destination. In the latter case, the lump sum price to the customer consists of the sale price at origin plus a sum roughly equivalent to the rail charges from origin to destination. Hence the cost to the purchaser is uniform regardless of the method of transportation utilized.

When Schenley performs the outbound service, no bills of lading are issued nor is any contract of transportation entered into between it and anyone else. Information respecting origin, destination, consignee and weight, but no charge for transportation is recorded on a "Schenley Affiliates Trip Sheet" by the distillery from which the shipment is moved.

All distillery materials and supplies are purchased f.o.b. origin apparently by Schenley's subsidiaries which carry them in their inventories. Occasional inbound movements

of such materials and supplies are made in Schenley's trucks upon the request of the traffic manager of the subsidiary to which delivery is made. As is the case with outbound transportation, no bills of lading are issued nor is any contract of transportation entered into between Schenley and anyone else. All pertinent information is recorded on a "Schenley Affiliates Trip Sheet."

None of the expenses of operation incurred in the inbound service is charged against any of the subsidiary corporations. All expenses incurred in the operations in outbound service are borne by Schenley and accounted for in its books. Claims for loss or damage of packaged liquors are paid by it.

With the foregoing facts before it, Division 5 of the Commission, one Commissioner dissenting and the third concurring in the result, found that both Lenoir and Schenley are private carriers as defined in section 203(a)(17) of the Act and not common or contract carriers as defined in section 203(a)(14)(15) and accordingly ordered dismissal of the applications.[1] (48 M.C.C. 259 and 405.) Upon oral argument pursuant to petitions therefor and for reconsideration, the Commission, one Commissioner dissenting and two being absent, made findings similar to Division 5, sustained the Division in both proceedings in one report (51 M.C.C. 65), and allowed its orders to stand. The conclusions supporting the findings are that the respective applicants are primarily engaged in the manufacture of furniture and in the sale and distribution of alcoholic liquors

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[1] In the *Schenley* case, two of the Commission's examiners in their report (Exhibit D to the Complaint herein) concluded that Schenley was a contract and not a private carrier and recommended denial of the application for failure of applicant to establish that its operations would be consistent with the public interest and the national transportation policy as required by § 209(b) of the Act. Upon exceptions thereto filed by applicant and replies thereto, Division 5 reversed the examiners.

and the motor operations of each are conducted as a bona fide incident to and in furtherance of their primary business and not for the purpose of profiting from the transportation as such (51 M.C.C. loc. cit. 76).

The three motor carrier plaintiffs brought this action in the United States District Court for the Eastern District of Virginia, Richmond Division, under Title 28, United States Code, sections 1336 and 2312-2325 to review the Commission's decisions and to set aside its order of May 27, 1948, dismissing Lenoir's application, and its order of June 21, 1948, dismissing Schenley's application. Regular Common Carrier Conference of the American Trucking Associations, Inc., leave granted, intervened as a plaintiff. The District Court, upon the pleadings, the arguments of counsel and briefs submitted filed its opinion on October 3, 1950, and on October 21 or November 17, 1950, entered final judgment dismissing the action. The court held that the Commission's interpretation of the Act and its holding that Lenoir and Schenley are private carriers is correct on the score of reason and authority and in the light of the history and manifest purposes of the Act.

The Question Is Substantial

The issues involved in this appeal are of great importance to the public transportation industry and the industrial and mercantile commerce of the United States and to the administration of the Interstate Commerce Act. Their importance to the administration of the Act is attested by the fact that the decisions of Division 5 were reconsidered by the entire Commission upon oral argument before it. Their importance to the public transportation industry and to the industrial and commercial business of the country is evidenced by the fact that the following organizations participated in the proceedings before the Commission: In op-

position to the decisions of Division 5: Regular Common Carrier Conference of the American Trucking Associations, Inc., Rail Carriers in Trunk Line Territory, Contract Carrier Conference of the American Trucking Associations, Inc., and Associated Motor Carriers, Inc., of South Dakota. In support of said decisions: Indiana State Chamber of Commerce, Detroit Board of Commerce, Central Territory Rate Conference, National Council of Private Motor Truck Owners, Inc., Private Carrier Conference of the American Trucking Associations, Inc., Illinois Territory Industrial Traffic League, Wisconsin Manufacturers Association, Southern Traffic League and National Industrial Traffic League.

The issues involved raise an important question of law which has not been, but should be, settled by the Supreme Court.

The national transportation policy declares the Congressional intent to provide for fair and impartial regulation of all modes of transportation subject to the Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices and to encourage fair wages and equitable working conditions; all to the end of developing and preserving a national transportation system by water, highway and rail as well as other means, adequate to meet the needs of commerce. The policy directs that all provisions of the Act shall be administered and enforced to carry out its declarations (54 Stat. 899; note to 49 U. S. C. 1). That policy "is the Commission's

guide to 'the public interest' * * *." *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82. Attainment of the policy and the remedial character of the Act require that its provisions be liberally interpreted so as to bring under its dominion all carrier operations included within its expressed terms and by narrow construction of exemptions and provisions in the nature of or effecting exemptions to exclude only such carrier operations as clearly fall within their terms. *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage & S. Co.* v. *United States*, 316 U. S. 74, 83; *Piedmont & N. R. Co.* v. *I. C. C.*, 286 U. S. 299, 311. In the words of the Commission in Southern Fruit Distributors application, 31 M.C.C. 771, 776:

> "That act represents remedial legislation and contemplates a complete and comprehensive regulation of motor carriers for hire. Any exemption from its certificate and permit requirements, provided either directly or indirectly by exclusion from its definitions of common and contract carrier, must be determined by the rule of strict construction and in accordance with the declared policy of Congress as enunciated therein."

The definitions of common and contract carrier by motor vehicle are clear and comprehensive. They evince the statutory intent in keeping with the national transportation policy to regulate as common or contract carriers all who practice receipt of compensation by whatever name called or under whatever guise received for transportation by motor vehicle.

Nevertheless, the District Court and the Commission read Lenoir and Schenley out of and exempted them from the certificate and permit and other provisions of the Act regulating common and contract carriers although they receive compensation for motor transportation and their services

are available to that portion of the public purchasing goods from them. Clearly Lenoir and Schenley fall within one or the other of the statutory definitions of common and contract carrier. By § 203(a)(14) " 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle • • • of • • • property or any class or classes thereof for compensation". By § 203(a)(15) " 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) • • •) by motor vehicle of • • • property • • • for compensation." It is patent that when a motor carrier is in receipt of compensation for transportation service performed by him all of the incidents of his operation must be examined in the light of these two definitions. If the service is only casual or occasional, he is exempt under § 203(b)(9). If he holds himself out to the public generally or to that part of the public desiring or having need for the limited service offered, he is a common carrier and may be regulated as such. This is so, whether or not the transporter owns or has some interest in the property other than as bailee for purposes of transportation. *United States* v. *Ohio Oil Co.*, 234 U. S. 548, 559-560; *New York, N. H. & H. R. Co.* v. *I. C. C.*, 200 U. S. 361; *Salyards, Ext. of Operations*, 46 M. C C. 303, 305.[2] If he renders his service only in pursuance of individual contracts or agreements, he is a contract carrier. *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432; *Southern Fruit Dist., Inc.*, 31 M. C. C. 771, 776; *Enterprise Trucking Corp.*, 27 M. C. C. 264; *Lukens Steel Co.*, 42 M. C. C. 672.[3]

[2, 3] Each of these cases presented the issue whether transportation operations constituted private carriage as distinguished from common or contract carriage.

In the following cases among many others the receipt by the transporter of property owned by him or in which he had an interest other than as bailee for transportation of a sale price at destination higher than the cost of the property at origin was held to be compensation for transportation: *A. W. Stickle & Co.* v. *I. C. C.*, 128 F. 2d 155; *Carpenter*, 2 M. C. C. 85; *Monninger*, 2 M. C. C. 501; *Georgia*, 3 M. C. C. 601; *Johnson*, 10 M. C. C. 4; *Turner*, 29 M. C. C. 691; *Ogas*, 32 M. C. C. 437; *Salyards*, 46 M. C. C. 303. In each of these cases and many others decided by the Commission, the transporter was found to be a common or contract carrier within the definitions

On the other hand, notwithstanding that the transporter received payment for transportation as a separate item or a sale price at destination higher than cost at point of origin, he has been held in many cases to be a private carrier. Typical of such cases are: *Murphy*, 21 M. C. C. 54; *Spanhake*, 21 M. C. C. 258; *Dull*, 32 M. C. C. 158; *Woitishek*, 42 M. C. C. 193; *John S. Teeter & Sons, Inc.*, 43 M. C. C. 200; *Tyrrell's, Inc.*, 44 M. C. C. 552; *Katz*, 46 M. C. C. 869; and the two cases in issue here. The transporters in these cases perform exactly the same function as do the avowed for-hire carriers and are compensated for it.

In all the cases referred to in the two preceding paragraphs, the ultimate finding was made to depend upon whether the transporter was engaged in a "primary business" in connection with which the transportation was performed and whether he engaged in the transportation activity with a "purpose to profit" therefrom. The Commission says, and the District Court agrees, that if it is established that the primary business of the transporter is the manufacture or sale of the goods transported and the transportation thereof is in furtherance of that business and merely incidental thereto, the carriage from factory or

other place of business to the customer is private carriage even though a charge for the transportation is included in the selling price or is added as a separate item, if there be no purpose to profit from the transportation. This holding erases the distinction between compensation and hire. These criteria are not found in the Act but were devised by the Commission from consideration of the definition of "private carrier by motor vehicle" in § 203(a)(17) and applied by the Commission with the approval of the District Court in the cases at bar. That definition reads:

> "(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

Neither this definition nor those of common or contract carrier make any reference whatever to the "primary business" of the transporter or his "purpose to profit" from his transportation. Moreover, since the private carrier definition expressly excludes from its scope carriers included in either of the other carrier definitions, and, further, since the exclusion discloses a legislative intent not to classify as private carriers those who receive recompense for transportation of property which they own, etc., or in furtherance of any commercial enterprise, it is plain that the legislative intent was to classify and regulate all carriers receiving direct or indirect compensation for and measured by the extent of the service performed as common or contract carriers. In other words, the status of a carrier, once he is found to be receiving compensation for his services, is to be

determined by reference to the first two definitions and without any reference to the third. In *Schenley Dist. Corp.* v. *United States*, 326 U. S. 432, 436, the Supreme Court speaking of § 203(a)(17) said: "But that section applies only to the extent to which 203(a)(15) does not * * *." This precludes any consideration of the "primary business" of the operator or his purpose, if any, to profit from his operations. If he carries for compensation, he is to be regulated as a common or contract carrier. The objectives of the national transportation policy, its directive to the courts and the Commission to administer and enforce the Act to carry out its purpose, and the manifest intent of the Act to promote and protect the interests and well being of the common carriers, rail, motor and water[4] demand as much.

The decisions of both the Commission and the District Court are out of harmony with these objectives and purposes, and the Congressional directive.

When the facts of a motor carrier operation have been examined under the tests or criteria of paragraphs (14) and (15) of §203(a), the definitions in which are in themselves complete, there is no need to go further. The status of the operator as a common or contract carrier will then have been determined.

The sole office of the private carrier definition as shown by its exclusionary provisions and upon further examination of the Act and the history of the definition is to describe those carriers to be brought within the reach of any regulations the Commission might adopt under §204(a)(3) and the investigative directions in §226. Sec. 204 (a)(3)

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[4] Interstate Commerce Act § 218(b), 49 U.S.C. 318(b); *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82-83; *A. W. Stickle & Co.* v. *I.C.C.*, 10 Cir., 128 F. 2d 155, 159; Filing of Contracts by Contract Carriers, 20 M.C.C. 1, 11; Keystone Transportation Co., 19 M.C.C. 475, 495; Citrus Fruit from Florida to North Atlantic Ports, 266 I.C.C. 627, 635.

authorizes the establishment for "motor carriers" and "private carriers of property," if need therefor is found, of regulations to promote safety of operations, etc. Sec. 226 authorizes the Commission to investigate and report on the need for Federal regulation of the sizes and weights of motor vehicles and of the qualifications and hours of service of employees of all "motor carriers" and "private carriers of property."

The private carrier definition first appeared in §325 of H. R. 5262, 74th Cong., 1st Session, prepared by Coordinator Joseph B. Eastman and transmitted to Congress by the Commission. Senate Document No. 152, 73rd Cong., 2nd Sess. Subsequently, the Commission and the Coordinator transmitted a redraft of the bill which became S. 1629, 74th Cong., 1st Sess., and, as amended in committee, became part II of the Act. Sec. 325 of S. 1629 originally was the same as §325 of H. R. 5262 and eventually became §226 of the Act. In explaining revisions of S. 1629 to the Senate, Senator Wheeler stated that the private carrier definition "is transferred by the committee from a later section and applies to persons transporting their own goods in their own motor vehicles for commercial purposes." 79 Cong. Rec., 74th Cong., 1st Sess., p. 5651. The purpose of transposition is quite apparent. The committee added to the bill what is now paragraph 3 of §204(a). With two sections making reference to "private carriers of property" it was necessary for the sake of consistency and logical arrangement to transpose the definition into §203(a), devoted entirely to definitions.

"The province of construction lies wholly within the domain of ambiguity" Hamilton v. Rathbone, 175 U.S. 414, 421. No claim is made that the common and contract carrier definitions are ambiguous. Construction, whether by reference to matter extraneous to the statute or otherwise, is called for only when the plain words of a statute lead

to an obviously absurd or unreasonable result plainly at variance with the policy of the legislation as a whole. United States v. American Trucking Asso., 310 U.S. 534. And although the Commission's construction has been more or less consistent, has been indulged in for a considerable period and has been definitely settled so far as the Commission is concerned, the court is not bound to and will not follow or apply it in the face of the clear provisions of the Act and counter to the declared policy thereof. I.C.C. v. Railway Labor Ex. Asso., 315 U.S. 373; United States v. Missouri Pacific R. Co., 278 U.S. 269.

It is submitted that the decisions of the District Court and the Commission fail to give effect to the expressed terms and intent of the Act and are at variance with the national transportation policy.

Respectfully submitted,

/S/ JOHN T. GRIGSBY,
/S/ WALTER L. BAUMGARTNER,
/S/ FRANCIS E. BARRETT,
/S/ ROBERT J. MCBRIDE,
/S/ ALBERT B. ROSENBAUM,
Counsel for Plaintiffs-Appellants.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

I concur in this opinion.

/S/ ALBERT V. BRYAN,
U. S. District Judge.

Oct. 2-50.

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED; A. B. & C. MOTOR TRANSPORTATION COMPANY, INCORPORATED, and M. & M. TRANSPORTATION COMPANY, *Plaintiffs*,

Versus

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants.*

(Argued September 22, 1951, Decided ——)

Before Dobie, Circuit Judge, and Hutcheson and Bryan, District Judges.

DOBIE, Circuit Judge:

This is a suit to enjoin, vacate, and set aside orders of the Interstate Commerce Commission, dated May 27, 1948, and June 21, 1948. The order of May 27, 1948, was entered in the Commission proceeding entitled *Lenoir Chair Company Contract Carrier Application*, Docket No. MC 96541, and the order of June 21, 1948, was entered in *Schenley Distillers Corporation Contract Carrier Application*, Docket No. MC-107079.

By application filed with the Commission on March 25, 1946, Lenoir Chair Company of Lenoir, North Carolina, (hereinafter referred to as Lenoir), sought a permit au-

thorizing continuance of operation as a contract carrier by motor vehicle, over irregular routes, in interstate or foreign commerce for the transportation of furniture of its own manufacture and of materials, supplies, and machinery used, or to be used, in the manufacture of furniture, throughout a territory embracing all points in fifteen States and the District of Columbia. The application alleged that the motor vehicle operations involved were not those of a common or contract carrier but constituted private carriage only, and in order to secure a determination of this question by the Commission, it requested that the application be dismissed for want of jurisdiction, otherwise that it be granted a permit to engage in the operations described in the application. This is a correct method of securing a determination of its status. Schenley Distillers Corp. v. United States, 326 U. S. 432.

The application was assigned for hearing before an examiner of the Commission and hearing was held September 19, 1946. The evidence submitted by applicant related solely to the question of applicant's status. On December 23, 1946, the report recommended by the examiner was served on the parties to the proceedings. This report contained a finding that the applicant's operations were those of a private carrier and recommended that an order be entered dismissing the application. Thereafter, on February 11, 1947, exceptions were filed to the examiner's proposed report and recommended order by certain protestants and interveners and following replies to the exceptions by applicant and certain other interveners the Commission by Division 5, on May 27, 1948, issued its report in which the conclusion was reached that applicant was not a common carrier or a contract carrier but was a private carrier.

Schenley Distillers Corporation (hereinafter referred to as Schenley) filed its application with the Commission May 7, 1946, seeking a permit to operate in interstate or foreign

commerce as a contract carrier by motor vehicle over irregular routes in the transportation of alcoholic liquors of its own manufacture or that of its subsidiaries, and of materials and supplies used in their manufacture and sale throughout a territory including all points in fourteen States and the District of Columbia. The application alleged that the operations involved were those of private carriage and not common or contract carriage and requested the Commission to dismiss the application. The purpose of the application, just as that filed by Lenoir, was to secure a determination of the applicant's status with respect to whether it was a private carrier or a common or contract carrier.

The application was heard by an examiner of the Commission on September 5, 1946, at which evidence was introduced by applicant which related only to its status. On March 11, 1947, the report recommended by two Commission examiners was served containing a finding that the proposed operation by the applicant was that of a contract carrier by motor vehicle and not that of a private carrier. They further found that applicant had failed to establish that the operations involved would be consistent with the public interest and the National Transportation Policy and recommended that an order be entered denying the application. Thereafter, on March 14, 1947, exceptions were filed to the examiner's proposed report and recommended order by applicant and an intervener to which replies were duly filed by certain intervening protestants. On June 21, 1948, the Commission, by Division 5, issued its report which contained conclusions differing from those recommended by the examiners. In its report Division 5 (one of its three members dissenting) found that applicant's operations were not those of a common or contract carrier by motor vehicle as defined by the Act and dismissed the

application. This finding, it will be observed, had the effect of holding that applicant was a private carrier.

Being dissatisfied with the decision of Division 5, certain intervening protestants, including some of the intervening plaintiffs herein, filed petitions in both the Lenoir and Schenley proceedings requesting reconsideration by the entire Commission and oral argument. By order dated January 3, 1949, the Commission reopened both proceedings for oral argument and denied the petitions in all other respects. Since the proceedings in each case presented similar issues, the applications of both Lenoir and Schenley were heard together on oral argument before the entire Commission on April 21, 1949, and were disposed of in one report. Following the oral argument and after careful and thorough consideration of the issues involved, the Commission (one Commissioner dissenting and two others necessarily absent and not participating in the proceeding) found that both Lenoir and Schenley were not common or contract carriers by motor vehicle as defined by the Act, and that the applications should be dismissed. In view of the fact that the prior orders of Division 5 dismissing the applications were not vacated or set aside and remained in full force and effect, no further order was entered in either proceeding.

After these findings by the entire Commission, this suit was brought to enjoin and set aside the orders of Division 5 which held Lenoir and Schenley to be private carriers.

The facts in the case are not in dispute. The only question involved is one of law, namely, did the Commission err in finding that Lenoir and Schenley were not common carriers as defined in Part II of the Interstate Commerce Act (hereinafter called the Act), Section 203 (a) (14), or contract carriers as defined in Section 203 (a) (15), but private carriers as that term is defined in Section 203 (a) (17) of the Act (49 U.S.C., sec. 303 (a) (14), (15) and (17)).

The pertinent provisions of the statute involved in this case are found in Section 203 (a) which provide that as used in Part II of the Interstate Commerce Act:

"(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general

public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, * * *

(15) The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

The facts as to Lenoir and Schenley, as found by Division 5, may be briefly summarized: Lenoir operates five trucks in long-distance hauling and six or seven trucks in interplant service. It transports furniture from its plants to customers in the States named in the application, and whenever possible these vehicles are loaded on return with commodities used by applicant in its plants. Apparently at one time it did haul commodities for others, that is, persons other than itself or its customers, but this practice was discontinued some years ago, and applicant now transports and desires to transport out-bound, in interstate or foreign commerce, only its finished furniture to its factories. Of its total annual production, approximately $3,000,000, only between fifteen and twenty percent has been transported in its own trucks, the balance being transported by rail and motor common carriers. Its sales are made f.o.b. its factories. When it delivers furniture in its own vehicles it adds to this factory price a charge comparable to the charges of rail or motor carriers who are also used to the same destinations, and shows this figure separately on the

invoice. This is done in order that the delivery price at destination will be the same whether the furniture moves in applicant's vehicles or is transported by a carrier for hire and also "so as not to be unfair competition to any other carrier." Supplies and materials used by applicant are usually purchased f.o.b. origin, although sometimes a freight allowance is made by the supplier.

For some years Lenoir has maintained an account which reflects the income and expenses incurred in the operation of its trucks. Its representative was not certain how this account reflected transportation performed by its own vehicles when supplies are purchased f.o.b. origin. Where a freight allowance is granted, however, this amount is shown. On out-bound shipments, the amount collected, equal to the motor or rail rate, is shown. During the last six months of 1945 this account showed an income of $15,412.76 and expenses of $21,935.89, or a loss of $6,523.13. The total miles traveled during this period was 102,350. Total income for the first six months of 1946 was $13,461.33, and total expenses were $25,684.25, or a loss of $12,222.92. The total distance traveled in this period was 102,670 miles.

In many instances Lenoir's vehicles return empty to its plants. Thus the possibility of a return haul influences to some extent Lenoir's determination whether it will use its own vehicles for the out-bound transportation of its furniture to particular destinations. It is claimed, however, that this consideration is not absolutely controlling because considerations such as the needs of the customers, the availability of for-hire carriers, the expedition of delivery and good will are also given weight. Lenoir does not hold itself out to the general public or to anyone as a common carrier by motor vehicle. Neither are its services available to anyone as a contract carrier by motor vehicle under individual agreements or contracts. It desires only to continue the business of transporting its own manufactured products to its customers and to return to its plants supplies and materials used by it in its furniture manufacturing business.

Schenley now owns thirty-two tractors, thirty-one semitrailers, and one service truck. It rents garage facilities

at Lawrenceburg near the distillery of one of its subsidiary corporations, Schenley Distillers, Inc. At Lawrenceburg, it employs drivers and mechanics, and also a transportation engineer who superintends and manages the motor operations. At the time of the hearing herein in September, 1946, its motor operations were confined to service to and from the Lawrenceburg distillery of Schenley Distillers, Inc. However, Schenley intends to operate to and from other of its subsidiary corporations.

In 1945, the motor vehicles then owned by Schenley Motor transported less than 0.05 percent of all shipments moving to and from three of applicant's subsidiary corporations. While this record does not disclose the present percentage of traffic handled by Schenley's vehicles, apparently it is substantially the same as that in 1945.

Schenley purchases and takes title to the entire output of case liquors of its subsidiary corporations at the distilleries. All out-bound transportation performed by Schenley's vehicles consists of the movement of packaged liquor sold by Schenley to various purchasers.

When packaged liquor sold by Schenley is transported to the purchaser by rail and motor common carriers, it is sold f.o.b. point of origin. However, when it moves in Schenley's vehicles, it is sold f.o.b. destination. The price of packaged goods delivered directly to the purchaser in Schenley's vehicles is the selling price at origin plus a sum roughly equivalent to the rail rate from origin to destination. Thus a uniform delivery price is maintained in all instances regardless of the method of transportation utilized by the customer.

All expenses incurred in the operation of its vehicles including repairs, the wages of drivers, mechanics and other of its employees, are paid by Schenley and accounted for in its books. Claims for loss and damage of packaged liquor are filed with and, if warranted, paid by Schenley. Should a purchaser file a loss or damage claim with one of Schenley's subsidiary corporations, it would be forwarded to Schenley for investigation and adjustment.

When Schenley's vehicles are utilized for the described out-bound service, no bills of lading are issued nor is any

contract of transportation entered into between Schenley and any other party. Information with respect to origin, destination, consignee, and weight is recorded on what is known as a "Schenley Affiliates Trip Sheet" by the traffic department of the particular subsidiary corporation which distilled the liquor. Eight copies of this trip sheet are made, but nowhere thereon is there any stated or segregated amount for transportation. The traffic managers of Schenley's subsidiaries, while not employees of Schenley, are under the supervision of Schenley's general traffic manager.

All distillery supplies such as bottles, labels, corks, acids, soda ash, corn steep liquor, caramel, and concentrates, are purchased f.o.b. point of origin apparently by Schenley's subsidiary corporations. Schenley's vehicles handle an occasional in-bound movement of these distillery supplies at the request of the traffic manager of the particular subsidiary corporation. As stated, the traffic managers of the various subsidiary corporations are not employees of Schenley but are under the supervision of Schenley's general traffic manager. None of the expenses incurred in the operation of Schenley's vehicles even in this in-bound service is charged against any of its subsidiary corporations. When these in-bound supplies reach the subsidiary corporation, they are carried in its inventory. As is the case with all out-bound transportation, no bills of lading are issued nor is any contract of transportation entered into between Schenley and any other party, but all pertinent information is listed on a "Schenley Affiliates Trip Sheet."

We think the Commission's interpretation of the Act, and its holding that both Lenoir and Schenley are private carriers, is correct on the score of reason and authority and in the light of the history and manifest purposes of the Act. The injunction sought by plaintiffs must, therefore, be denied and their civil action must be dismissed.

The Commission, in deciding that Lenoir and Schenley are private carriers, as opposed to contract carriers or common carriers, applied what is known as *the primary business test.* In other words, if it is established that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that

business and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item. The Commission has so held consistently in its interpretation of the statutory provisions regulating the various categories of motor carriers. See, Congoleum-Nairn, Inc., Common Carrier Application, 4 M.C.C. 619; Swanson Contract Carrier Application, 12 M.C.C. 516; Murphy Common Carrier Application, 21 M.C.C. 54; Dull Contract Carrier Application 32 M.C.C. 158; Woitishek Common Carrier Application, 42 M.C.C. 193.

In the Woitishek case (discussed at length in all the briefs before us), the primary business test, as a criterion for distinguishing between (on the one hand) private carriers and (on the other hand) contract and common carriers, was carefully reexamined and reanalyzed by the Commission, and the conclusion was reached:

> "After careful consideration of the entire subject, * * * that we should continue as in the past to determine all issues of for-hire versus private carriage on the basis of the operator's primary business."

Though the question here involved is one of law, it is well settled that the courts should give great weight to the Commission's interpretation of the Act. Thus in *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, 672, Mr. Justice Burton said:

> "As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration."

See, also, *United States* v. *American Trucking Association*, 310 U. S. 534, 549; *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U. S. 422, 426; *McLean Trucking Co.* v. *United*

States, 321 U. S. 67, 87-89; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315.

It might be well to emphasize at this point that in the instant case both Lenoir and Schenley transport in their own motor vehicles property which they (or, in the case of Schenley, its subsidiaries) manufacture and own at the time the transportation services are performed. They carry for no one else and do not hold themselves out to do so. The goods transported are for sale and in furtherance of their primary business of manufacturing. While a charge of transportation is either included in the sales price of their goods or is added to the selling price as a separate item, in either event no charge is made for the transportation as such. Neither company is primarily engaged in the transportation business. The facts show that they transport only a very small percentage of their total products, and that the cost of the transportation exceeds the revenue derived therefrom. Measured by the test contained in the statute, the Commission, we think, has found correctly that neither Lenoir nor Schenley is either a contract carrier or a common carrier, but each is a private carrier.

The Commission's application of the primary business test as a criterion for distinguishing between common and contract carriers on the one hand and private carriers on the other hand, has been quite generally upheld by the courts. In *Interstate Commerce Commission* v. *Clayton*, 127 F. (2d) 967, 969, Circuit Judge Phillips stated:

> "He does not hold himself out to the general public to haul coal for compensation. He does not haul coal for compensation to fill particular orders or under individual contracts or agreements. He has indulged in no subterfuge or design to avoid the requirements of Part II of the Interstate Commerce Act. The cost of the coal and transportation is $5.57 per ton. He sells it for $8.50 per ton. Thus he realizes a profit, both from the transportation and from the sale of the coal, the margin of profit being large enough to cover both.

> We conclude he is engaged in the bona fide coal business; that he transports coal of which he is the owner for the purpose of subsequent sale and in furtherance of a commercial enterprise; and that the trial court was warranted in finding that he is a private carrier."

In Interstate Commerce Commission v. Tank Car Oil Corporation, 151 F. (2d) 834, 837, Circuit Judge Waller said:

> "We think that Congress not only intended to say, but said, that if a person, in good faith, transports his own property for the purpose of sale or in furtherance of his own commercial enterprise he is a private carrier and, therefore, is not subject to the provisions of the Act."

Again, Circuit Judge Collet remarked, in Beggs v. Kroger Co., 167 F. (2d) 700, 702-703:

> "The defendant was not a common carrier or a contract carrier, but it was a private carrier of property by motor vehicle if defendant was engaged in the transportation of goods in interstate commerce for the purpose of sale or in furtherance of any commercial enterprise."

In A. W. Stickle Co. v. Interstate Commerce Commission, 128 F. (2d) 155, 160-161, cert. den. 317 U. S. 707, where the factual pattern warranted a different conclusion, Circuit Judge Phillips was careful to point out:

> "The transportation is not merely incidental to the business of selling lumber. It is a major enterprise in and of itself. The major portion of Stickle & Company's capital investment is in that enterprise, and the major portion of its payroll goes to employees engaged in that enterprise."

And see the dissenting opinion of Circuit Judge Huxman in this case.

Opposed to these cases is Interstate Commerce Commission v. Jamestown Sterling Corporation, 64 F. Supp. 121,

decided by a single District Judge. And, cf. Interstate Commerce Commission v. Pickard, 42 F. Supp. 351. In Schenley Distillers Corporation v. United States, 61 F. Supp. 981, 988, aff'd 326 U. S. 432, a subsidiary corporation engaged solely in transporting for its parent corporation and other subsidiaries was held to be a contract carrier, but Circuit Judge Maris was careful to note:

> "In each of these as well as many other cases cited in which it was necessary to determine whether the carriage was for hire or was private carriage it was found helpful to determine whether the primary business was the supplying of transportation or whether the transportation was merely incidental. The problem there requiring solution does not concern us since in this case it is undisputed that the primary and indeed the sole business of Motor Division is that of transportation."

Counsel for plaintiffs here point out that under the statutory definitions one is a private carrier only if one is "not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle.'" This is true, and equally true is it that the term "compensation" is found only in the statutory definitions of common carrier and contract carrier, not in the definition of private carrier. But it does not follow, as plaintiffs contend, that wherever compensation, direct or indirect, is found, the carrier is (with only those exceptions made express in the Act) a common carrier or a contract carrier.

Plaintiffs are here attributing to the term "compensation" a mystical significance which the term does not possess. There are fallacies in this connection even if resort be had, as plaintiffs wish, to mere mechanical logic and a purely analytical interpretation of the terms used in the statutory definitions. Thus, the clause "when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise" appears (a) in the definition of private carrier, but not (b) in the other two definitions, common carrier and contract carrier. Accordingly, by this same logic, the basic difference be-

tween (on the one hand) common carriers and contract carriers and (on the other hand) private carriers, is whether or not the "transportation is for the purpose of sales, lease, rent or bailment, or in furtherance of any commercial enterprise." Possibly, this confused thinking of plaintiffs may be due somewhat to the fact that at common law, the common carrier of goods must carry for a compensation. See, Dobie, Bailments and Carriers, 296, 300, 304.

The history of the Act, we think, completely demolishes the validity of plaintiff's *compensation* criterion and supports the Commission's criterion of *Primary business purpose.* In the "Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session on S. 1629" (Government Printing Office, Washington, 1935), page 86, the late Commissioner Joseph B. Eastman testified as follows in response to questions asked by Senators Hastings and Wheeler (as to whether the proposed bill to regulate motor carriers would regulate the transportation by owners of their own goods being transported to their customers):

> "Well, I was going to say that in instances where the trucker actually buys the products which he transports, if that is a bona fide transaction and not merely a device to evade regulation, he would be a private carrier."

Representative Holmes, in explaining the provisions of the Act to Members of the House, said:

> "In other words, the department stores in Washington that may sell a bill of goods to be delivered in Philadelphia, New Jersey, or Massachusetts, do not come under the provisions of this bill because they are private owners of motor vehicles."

Again, during the debate on the Act, Senator Wheeler pointed out:

> "The definition of 'private carrier of property by motor vehicle' is transferred by the Committee from a later section and applies to persons transporting

their own goods in their own vehicles for commercial purposes. The only regulation to which such carriers are subjected is that with respect to the maximum hours of service and qualifications of employees and the safety of operation and equipment—section 204 (n) (3)."

To like effect is the statement of Senator Reed:

"I think the time may come when we shall have to regulate the transportation of private property by the owner of such property when it is transported for commercial purposes. But I fully concur in the statement of the chairman of the committee that there is nothing in the bill which undertakes to do it."

Again, note the dialogue between Senators McKellar and Wheeler:

Mr. McKellar: "To use the illustration I gave a while ago, if a private concern in Memphis, Tenn., desires to deliver its goods to the South, in Mississippi, or to the West, in Arkansas, it may do so without coming within the provisions of the bill?"

Mr. Wheeler: "Exactly. The most attempted to be done—that has not been done—is to try to regulate the safety conditions. There is a provision in the old law, which remains the same with respect to safety provisions."

Finally, in this connection, it may be noted that, by a vote of 54 to 21, the Senate rejected the so-called Shipstead Amendment. Senator Shipstead proposed to add to the bill S. 2009 a clause amending the Federal Trade Commission Act to make it a violation of law "for any person, partnership or corporation to so fix the price at destination of any goods or commodities transported in commerce, that such price includes a charge for transportation, based upon railroad rates, for any part of the transportation of such goods or commodities which was not conducted by railroad." Congress also rejected the so-called Miller-Wads-

worth amendment in favor of the *compensation test*. Nor has Congress, evidently quite aware of the consistent practice of the Commission in applying the *primary business test* in determining the statutory status of carriers, ever amended the Act so as to negative this practice. If the *compensation test* should be rigidly applied, it is not difficult to foretell the vast volume of cases which would thereby be cast on the already heavily burdened Interstate Commerce Commission.

We deem it not inappropriate to consider what might be called the economic approach to the problem before us, in the light of what might be called the felt needs and the best interest of the interstate carriers of goods by motor vehicle. In our considered judgment, such an approach strongly favors the *primary business test* as against the *compensation test*. And the problem before us is preeminently one that should be solved not by theoretical abstractions or by excursions into juristic semantics but rather by practical common-sense. Just what type or measure of compensation was intended by Congress to bring the carriage within Section 203(a)(14) or (15) is best ascertained by the *primary business test*. And, in the application of this test, the motive to profit by the carriage and the relation of the carriage to the business involved are important elements.

Though the point was not stressed by counsel for plaintiffs, either in the briefs or in oral argument, we think it well to state that we see nothing in the instant case even tending to show that Schenley is attempting by subterfuge to evade the impact of the decision in *Schenley Distillers Corporation* v. *United States*, 61 F. Supp. 981, affirmed in 326 U. S. 432.

In considering the reasons why commercial concerns, such as stores or factories, having goods for sale, should resort to transporting them in their own motor vehicles, the Commission stated (Sheet 12, Exhibit G to the Complaint herein):

> "It is recognized that there are a number of very good reasons, apart from a desire to set up a separate business for profit, which prompt mercantile, or com-

mercial concerns to conduct all or a portion of their own motor operations rather than to rely upon the services of for-hire carriers. Not the least among these reasons is the matter of good will fostered by the prompt and efficient delivery of rush orders to customers. Other advantages accruing to a private carrier flow from its absolute control over, and exclusive use of, the motor equipment assuring (1) the absence of congestion at loading docks, (2) the safe arrival of goods not mixed with goods of other shippers and not exposed to extra or inexperienced handling, and (3) on-time deliveries of finished goods at customers' doors and of raw materials and supplies at its plant. The use of its own equipment also enables a private carrier to avoid expensive packaging sometimes necessary when shipment is by motor common carriers."

The application of plaintiffs for an injunction and for a judgment vacating and setting aside the instant orders of the Interstate Commerce Commission is denied and the complaint of plaintiffs is dismissed.

Complaint dismissed.

I concur—

(S.) STERLING HUTCHESON,
U. S. District Judge.

Oct. 3, 1950.

Appendix A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED, A B & C MOTOR TRANSPORTATION COMPANY, INC., M & M TRANSPORTATION COMPANY, *Plaintiffs*,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

ORDER OF DISMISSAL

This action having come on for hearing on the 22nd day of September, 1950, before a statutory Court composed of Armistead M. Dobie, Judge of the Court of Appeals for the Fourth Circuit, Sterling Hutcheson, United States District Judge for the Eastern District of Virginia, and Albert V. Bryan, United States District Judge for the Eastern District of Virginia, upon the pleadings filed herein, the arguments of counsel and briefs submitted herein, and the Court having maturely considered the same, and having filed its opinion herein on October 3, 1950, it is

Ordered, Adjudged and Decreed that the above-styled action be, and the same is hereby, dismissed.

(S.) ARMISTEAD DOBIE,
Judge, Court of Appeals,
Fourth Circuit;
(S.) STERLING HUTCHESON,
United States District Judge;
(S.) ALBERT V. BRYAN,
United States District Judge.

October 21, 1950.

Appendix A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED, A B & C MOTOR TRANSPORTATION COMPANY, INC., M & M TRANSPORTATION COMPANY, ET AL., *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

FINAL JUDGMENT

This action having come on for hearing on the 22nd day of September, 1950, before a statutory Court composed of Armistead M. Dobie, Judge of the Court of Appeals for the Fourth Circuit, Sterling Hutcheson, United States District Judge for the Eastern District of Virginia, and Albert V. Bryan, United States District Judge for the Eastern District of Virginia, upon the pleadings filed herein, the arguments of counsel and briefs submitted herein, and the Court having maturely considered the same, and having filed its opinion herein on October 3, 1950, it is

Ordered, adjudged and decreed that the above-styled action be, and the same is hereby, finally dismissed on the merits, and that the defendants recover from the plaintiffs their costs and have execution therefor.

(S.) ARMISTEAD DOBIE,
Judge Court of Appeals, Fourth Circuit.

(S.) STERLING HUTCHESON,
United States District Judge.

(S.) ALBERT V. BRYAN,
United States District Judge.

Dated: November 17, 1950.

Appendix B

Statutes Involved

Section 203(a)(14)(15)(17) (49 Stat. 544; 54 Stat. 920; 49 U.S.C. §303(a)(14)(15)(17)) of the Interstate Commerce Act, as amended:

Sec. 203(a) As used in this part—

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be a considered to be and shall be regulated as transportation subject to part I.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Preface to Interstate Commerce Act (added Sept. 18, 1940, 54 Stat. 899)

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial

regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, cooordinating, and preserving a national transportation system by water, highway, and rail as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Prior to Sept. 18, 1940, a declaration of policy appeared in the Interstate Commerce Act as section 202(a) (49 Stat. 543) and read as follows—

Sec. 202(a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Office-Supreme Court, U.S.
FILED
JAN 26 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 517

BROOKS TRANSPORTATION COMPANY, INCORPORATED, A B & C MOTOR TRANSPORTATION COMPANY, INC., M & M TRANSPORTATION COMPANY, ET AL., *Appellants,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SCHENLEY INDUSTRIES, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT OF SCHENLEY INDUSTRIES, INC., OPPOSING JURISDICTION AND MOTION TO AFFIRM.

CHARLES PICKETT,
Counsel for Appellee, Schenley Industries, Inc.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED, ET AL.,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SCHENLEY INDUSTRIES, INC., ET AL.,

Defendants-Appellees.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO AFFIRM.

(Filed January 3, 1950)

Appellee, Schenley Industries, Inc., (hereinafter called "Schenley"), pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States, submits the following statement in opposition to appellants' statement of jurisdiction, and moves that the final judgment and decree of the District Court be affirmed.

I. The Issue

The case involves Part II of the Interstate Commerce Act (49 U.S.C. § 301 *ff.*), familiarly known as the Motor Carrier Act, which we shall call "the Act."

The statutes and the undisputed facts appear from the opinion below and the motion of other appellees, and will not be repeated here.

The basic issue is this:

> When a concern primarily engaged in a non-trucking business (in Schenley's case, the distribution of alcoholic beverages) uses its own vehicles to deliver goods to its customers, at a delivered price, is it a "private carrier" under the Act?

The Interstate Commerce Commission (51 M.C.C. 65) and the District Court (93 F. Supp. 517) answered that question "yes." That conclusion is so plainly correct that the appeal presents no substantial question for this Court to review.

II. The Act's Legislative History Confirms the Soundness of the "Primary Business" Test

(To avoid duplication, we shall not mention those parts of the legislative history quoted by the District Court and in the motion of the other appellees.)

1. Referring to the Act, this Court said: "The recognized practices of an industry give life to the dead words of a statute dealing with it." *United States* v. *Mather*, 307 U.S. 148, 155 (1939).

The Act embodied a recognized distinction in the industry between two broad groups of motor vehicle operators.

The first group comprised for-hire carriers (now "common" or "contract" carriers), whose business was the sale of transportation service. They might haul liquor or lumber, but they did not sell it. They were not interested in the cargo carried, except as a means of earning trucking charges. To them, transportation was an end in itself.

Second were the self-truckers (now "private" carriers),

whose business was the sale of goods. They were vitally interested in the cargo carried. Of course they performed the same activity as for-hire carriers, and of course they expected to recoup their trucking expense from their customers. But to them transportation was only a means to an end—the promotion of their primary commercial enterprise.

This distinction was noted as far back as *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, 705-706 (1928):

> "Truck operations fall into one of three general classes: (1) Where the truck is owned by the operator and is used in the transportation of his own goods or products and in the conduct of his business—*the owner-operated truck;* (2) the so-called *contract carrier*, who enters into special agreements for transportation with one or more shippers, but does not hold himself out to haul for the public generally; (3) the *common-carrier* truck, which (*a*) operates on schedule over a regular route or between fixed termini, and usually at published rates, from which it may not depart, and (*b*) the so-called anywhere-for-hire carrier.
>
> "In the first class are the trucks owned and operated by manufacturers, merchants, jobbers, farmers, and others in the conduct of their business. There is no suggestion from any source that motor trucks of this class engaged in the transportation of interstate commerce should be placed under Federal regulation."[1]

A similar analysis appears in the report of Commissioner Eastman, as Federal Coordinator of Transportation, accompanying the bill which ripened into the Act. *Regulation of Transportation Agencies*, S. Doc. 153, 73d Cong., 2d Sess. (1934), pp. 172-173.

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[1] Italics in this quotation were the Commission's. Hereafter all italics are ours unless otherwise stated.

The definition of "private carrier" in that bill was practically identical with the present definition.[2]

2. As Commissioner Eastman pointed out, the "proposed bill provides no specific regulation of the private carrier," *ibid.*, p. 23, note 28, and "contains no 'commodities clause' or prohibition against the transportation by a motor carrier of its own property," *ibid.*, p. 49.

Congress agreed that private carriers should not be regulated, except as to safety matters. That decision was not based on some naive illusion that private carriers furnished gratis transportation. Necessarily every business man delivering goods in his own vehicles must shift his trucking expense to his customers, or eventually he will go bankrupt. As one witness put it during the hearings on the bill, "the ultimate price of a commodity to the buyer must have cost of transportation included in it." *Hearings before the Senate Committee on Interstate Commerce,* 74th Cong., 1st Sess., on S. 1629 (Feb. 25 to Mar. 6, 1935), p. 301.[3]

The decision not to regulate private carriers was based on completely pragmatic reasons. Private carriers were very numerous.[4] Their regulation would have revolution-

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[2] It appeared in § 325 of the proposed bill (*Regulation of Transportation Agencies,* p. 370):

> "The term 'private carrier of property by motor vehicle' shall mean any person not included in the terms 'common carrier by motor vehicle', or 'contract carrier by motor vehicle' as defined in this part, who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in furtherance of any commercial enterprise."

[3] This reference is hereinafter cited as *"Hearings."*

[4] Commissioner Eastman testified that "out of the total of what we call intercity movement of goods by major truck, we estimated that probably as much as half is performed at the present time by private carriers, in other words, by industries or persons which own or lease their own motor vehicles." *Hearings,* pp. 62-63. Indeed, the commercial truckers argued that because the bill would not regulate "the owner-operated trucks haul-

ized business practice and imposed a terrific burden on the Commission. Regulation of their "rates" would have been impracticable.[5] And it was felt that they would furnish a useful check on commercial truckers (*Regulation of Transportation Agencies*, pp. 33-34), in view of "the natural tendency of business to flow from for-hire trucks to shipper-owned trucks" when the former charged exorbitant rates (*Hearings*, p. 368).

3. The basic line of demarcation between regulated ("common" and "contract") carriers and unregulated ("private") carriers was to be the "primary" or "principal" business of the vehicle operator.

Commissioner Eastman said in his report (*Regulation of Transportation Agencies*, p. 194):

> "Even when contract carriers have been included within the scope of regulation, troublesome difficulties have arisen from various schemes and devices used to circumvent the law. These have generally consisted of the leasing or pretended sale of equipment to shippers, or of fictitious sales to the carrier of the property transported, thus giving to the transportation the color of private carriage. 'Corporations' composed of shipper and carrier 'stockholders' have been formed for the same purpose, and extensive 'peddling' *operations have been engaged in by persons whose primary business is that of motor transportation.* These and other evasions of the laws which have made enforcement difficult and partially ineffective, as well as the conclusion that bona fide private carriers should be subjected to

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ing the goods of their owners and comprising a very large percentage of the total number of trucks used," the "imposition of any burdensome restrictions upon motor vehicles for hire as distinguished from vehicles hauling freight of their owners would not be in the public interest." *Hearings*, p. 96.

[5] *Hearings*, pp. 62-63, 86, 347. Manifestly the amount charged the customer for the transportation could not be regulated satisfactorily without also controlling the amount charged for the goods. *Cf. Stephenson* v. *Binford*, 287 U. S. 251, 278 (1932).

reasonable regulation, have led eight States to adopt laws covering the private carrier."

Even the opponents of the bill recognized the "primary" or "principal" business test. One witness testified (*Hearings*, p. 330):

> "It has already been shown that over 85 percent of the vehicles operated in this country are operated by those classed as private carriers in this bill. In other words, they *are operated by those whose principal business is not the transportation of property for compensation.*"

4. No shred of evidence supports appellant's assertion that there was a "legislative intent not to classify as private carriers those who receive recompense for transportation of property which they own, etc., or in furtherance of any commercial enterprise . . ."

In fact, the very silence of the "private carrier" definition on the subject of "compensation" shows that, when "such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise," it is private carriage whether "for compensation" or not.

Moreover, the Act itself shows that the distinguishing feature between regulated and unregulated transportation is not the presence or absence of "compensation."

Section 203(b)(9) of the Act (49 U. S. C. § 303(b)(9)) excludes from regulation "the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce *for compensation* by any person not engaged in transportation by motor vehicle *as a regular occupation or business* . . ."

Plainly, therefore, the crucial fact is not whether "compensation" is received, but whether the transportation is conducted "as a regular occupation or business" or merely

as ancillary to a non-transportation business—which is exactly what the decision below holds.

Indeed, the following colloquy makes it plain that the phrase "for compensation" in the "common" and "contract" carrier definitions was intended solely to exclude from the Act those rather exceptional carriers who act gratuitously (*Hearings*, p. 59):

> "The Chairman. Mr. Eastman, if you take contract carriers, just simply as a general word, in the terms you have outlined there, it would simply give you power to regulate a person who carried somebody across the State line *without charge*, unless you had some *limiting words* in there, would it not?
>
> "Mr. Eastman. *In the definition the words 'for hire' are used.*"[6]

5. Of course the legislative history may properly be considered. It is sufficient to mention *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534 (1940), construing this very Act (pp. 543-544):

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

III. The "Primary Business" Test Has Been Applied by the Commission from the Outset

In scores of decisions, the Commission has uniformly followed the "primary business" test, first enunciated in an early case in which Commissioner Eastman participated.

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[6] Incidentally, no better proof exists to show that appellants' supposed "distinction between compensation and hire" is non-existent. The two terms always have been used interchangeably in this field. See, *e.g.*, Mr. Justice Story in *Citizens' Bank* v. *Nantucket Steamboat Co.*, Fed. Cas. #2,730, 5 Fed. Cas., at p. 725 (1811). Although the definition actually used the term "for compensation," Commissioner Eastman inadvertently used the more customary term "for hire."

Carpenter Common Carrier Application, 2 M. C. C. 85, 87 (1937).

Of course a delivered price always contains a charge for the transportation. But uniformly the Commission has held that a concern primarily engaged in a non-trucking enterprise is a private carrier when it sells on a delivered price basis, and trucks the goods itself.

That is true when the transportation charge is buried, more or less deeply, in a uniform delivered price.[7]

That is true when the transportation charge is readily identifiable, even though it is not stated separately, *e. g.*, when the delivered price varies with the distance.[8]

It is true even though the transportation charge is stated separately, so that the customer is quoted "a price" for

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[7] See, *e.g., Levine Contract Carrier Application*, 6 M.C.C. 4, 5 (1939); *Brozdowski Common Carrier Application*, 24 M.C.C. 484, 485 (1940); *Monark Egg Corp. Contract Carrier Application*, 26 M.C.C. 615 (1940); *Southern Utah Produce Co. Common Carrier Application*, 29 M.C.C. 767, 769 (1941); *Dull Contract Carrier Application*, 32 M.C.C. 158, 159-160 (1942); *Dodd Common Carrier Application*, 34 M.C.C. 705-707 (1942); *Marcellus Contract Carrier Application*, 43 M.C.C. 128, 129-130 (1944).

Similarly, a person primarily acting as commission agent or a contractor is a private carrier although his compensation includes an unstated amount for trucking the goods. See, *e.g., Whites Garage & Service Station Common Carrier Application*, 7 M.C.C. 453, 454 (1938); *Howrigan Contract Carrier Application*, 11 M.C.C. 455, 456 (1939); *Swanson Contract Carrier Application*, 12 M.C.C. 516, 519-520 (1939); *Economy Oil Company, Inc., Contract Carrier Application*, 13 M.C.C. 163, 164 (1938); *Teton Oil Company Contract Carrier Application*, 14 M.C.C. 440, 442 (1939); *Trohn's Supplies, Inc., Common Carrier Application*, 20 M.C.C. 127, 128 (1939); *Monk Contract Carrier Application*, 20 M.C.C. 115 (1939); *Brown & Root, Inc., Contract Carrier Application*, 24 M.C.C. 47 (1940); *Wakefield Contract Carrier Application*, 27 M.C.C. 671, 672-673 (1941); *Williams Bros. Corp. Contract Carrier Application*, 44 M.C.C. 557, 566-567 (1945).

[8] See, *e.g., Congoleum-Nairn, Inc. Contract Carrier Application*, 2 M.C.C. 237, 240 (1937); *D. L. Wartena, Inc., Common Carrier Application*, 4 M.C.C. 619, 623 (1938); *Swanson Contract Carrier Application*, 12 M.C.C. 516, 520 (1939); *Youngson Common Carrier Application*, 21 M.C.C. 625, 626 (1942); *Woitishek Common Carrier Application*, 42 M.C.C. 193, 205-206 (1943); *John S. Teeter & Sons, Inc., Common Carrier*

the goods plus an additional amount for the transportation.[9]

The court decisions, reviewed in the opinion below (93 F. Supp., at pp. 523-524), are to the same general effect.

The Commission has never approved appellants' "compensation" test or failed to apply the "primary business" test.

IV. The Commission's Settled Construction of the Act Has Been Approved by Congress

1. The Commission's unbroken construction is entitled "to especially significant weight in the interpretation of this Act," *Levinson* v. *Spector Motor Service,* 330 U. S. 649, 662 (1947).

"This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *United States* v. *American Trucking Assns., Inc.,* 310 U. S. 534, 549 (1940).[10]

2. But the significance of the Commission's decisions goes even deeper.

Application, 43 M.C.C. 200, 202 (1944); *Tyrrell's Inc., Common Carrier Application,* 44 M.C.C. 552, 555-556 (1945).

Similarly, a commission agent whose compensation includes a specified sum for trucking the goods is a private carrier. *Record & Glotfelty Contract Carrier Application,* 6 M.C.C. 481, 483 (1938); *Cyr Contract Carrier Application,* 17 M.C.C. 658, 660 (1939).

[9] See, *e.g., Murphy Common Carrier Application,* 21 M.C.C. 54, 55 (1939); *Spanlake Common Carrier Application,* 21 M.C.C. 258, 259 (1939); *Glosserman Chevrolet Co. Contract Carrier Application,* 27 M.C.C. 471, 472 (1941); *Katz Contract Carrier Application,* 46 M.C.C. 869 (1946).

[10] See also, *Noble* v. *United States,* 319 U. S. 88, 93, note 4 (1943); *Boutell* v. *Walling,* 327 U. S. 463, 471 (1946); *Hiatt* v. *Brown,* 339 U. S. 103, 109 (1950).

When the bills which eventually became the Transportation Act of 1940 (54 Stat. 898) were under consideration, the subject of private carriage was carefully reviewed. It was recognized that private carriers were not regulated by the existing Act. See, *e. g., Hearings before the House Committee on Interstate and Foreign Commerce,* 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862 (Jan. 24 to Mar. 30, 1939), pp. 230, 333-334, 1069-1070.

Hence the Commission was asked to report on "the extent to which control over interstate transportation of property other than by common or contract carriers would be practicable and desirable." *Ibid.*, p. 1557.

The Commission reported by a letter dated April 3, 1939, from Commissioner Eastman to Representative Lea, Chairman of the House Committee on Interstate and Foreign Commerce. After quoting the "private carrier" definition, the Commission said:

> "*In that connection, question has arisen as to whether an industrial establishment which delivers its products to customers by its own trucks is a 'private carrier of property', if the price which the customer pays for the products includes an increment to cover the cost of this transportation.* This question was considered by Division 5 of the Commission in *Congoleum-Nairn, Inc., Contract Carrier Application,* 2 M. C. C. 237, where a situation of that general character existed. It was there found that applicant was 'not engaged in the transportation of property' and that it was 'in no sense a carrier for hire in its motor-vehicle operations', since they were 'conducted by it as an integral part of its business of manufacturing and selling the commodities described.' *Applicant was held to be, 'in these motor-vehicle operations, incidental to its principal business, * * * a private carrier within the terms of the above definition.'* "[11]

[11] The letter is referred to in *Hearings before the Senate Committee on Interstate Commerce,* 76th Cong., 1st Sess., on S. 1310, etc. (Apr. 3 to

Thus the Commission's interpretation of the Act—the "primary" or "principal" business test—was expressly called to Congress' attention.

Congress rejected efforts to curtail private carriers' activities, including an attempt to prevent the very practice involved here—the inclusion, in delivered prices of goods transported by truck, of amounts based on rail freight rates. The details are given in the opinion below (93 F. Supp., at pp. 524-525) and the motion of other appellees, and need not be repeated here.

When Congress passed the Transportation Act of 1940, it reenacted the definitions without material change. It changed the wording, but not the meaning, of the "common carrier" and "contract carrier" definitions. *Thomson* v. *United States*, 321 U. S. 19, 24, note 2 (1944). Carefully it left the "private carrier" definition unchanged.

Thereby Congress in effect approved and codified into law the Commission's previous interpretation of those definitions—the "primary business" test and the decisions applying it. "Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law." *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 116, (1939).[12]

V. No Substantial Question Exists

Appellants' "compensation" test is derived solely by plucking certain words out of the Act and completely ignoring the rest of the statute.

14, 1939), pp. 765-766. The quotation is from page 6 of the Commission's file copy of the letter.

In the *Congoleum-Nairn* case, the delivered price exceeded the f.o.b. plant price by an amount based on the railroad carload freight rate. The situation was exactly comparable to Schenley's operations.

[12] See also, *Morgan* v. *Commissioner of Internal Revenue*, 309 U. S. 78, 81 (1940); *Crane* v. *Commissioner of Internal Revenue*, 331 U. S. 1, 7-8 (1947); *United States* v. *Wyoming*, 331 U. S. 440, 452-453 (1947); *United States* v. *Zazove*, 334 U. S. 602, 623-624 (1948).

That is not the way to construe the Act. Statutes must be construed as a whole. *Securities and Exchange Comm.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350-351 (1943); *Commissioner of Internal Revenue* v. *Wodehouse*, 337 U. S. 369, 379, 393 (1949); *Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 514 (1949); *United States* v. *Alpers*, 338 U. S. 680, 684 (1950).

"To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 542-543 (1940).

The "compensation" test has no support in the Act or its legislative history. It is contrary to the decisions construing the Act. Appellants are really seeking to overrule a settled line of decisions and impose, by indirection, limitations on private carriage which Congress never desired and has refused to sanction.

We respectfully submit that no substantial question is presented by this appeal, and move that the judgment of the District Court be affirmed.

Dated: January 1, 1951, 25 Broadway, New York 4, N. Y.

(S.) CHARLES PICKETT,
Counsel for Defendant-Appellee,
Schenley Industries, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED; A. B. & C. MOTOR TRANSPORTATION COMPANY, INC., AND M. & M. TRANSPORTATION COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree, entered November 17, 1950,[1] by a district court of three judges specially constituted pursuant to Sections 2284 and 2325, Title 28 of the United States Code, dismissing appellants' complaint seeking to set aside orders of the Interstate Commerce Commission entered May 27, 1948, and June 21, 1948. Appeal was allowed on December 18, 1950, and the appeal papers were served on December 19, 1950.

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[1] The court rendered its opinion on October 9, 1950, reported 93 F. Supp. 517.

The order of May 27, 1948, was entered in the Commission proceeding entitled *Lenoir Chair Company Contract Carrier Application,* Docket No. MC-96541,[2] and the order of June 21, 1948, was entered in *Schenley Distillers Corporation Contract Carrier Application,* Docket No. MC-107079.[3]

Lenoir Chair Company, hereinafter referred to as Lenoir, filed its application with the Commission on March 25, 1946, for a permit authorizing continuance of operations as a contract carrier in interstate commerce of furniture of its own manufacture, as well as materials, supplies and machinery used in connection therewith, throughout a territory embracing points in 15 states and the District of Columbia.

Schenley Distillers Corporation, hereinafter referred to as Schenley, filed its application with the Commission on May 7, 1946, for a permit to operate in interstate commerce as a contract carrier of alcoholic liquors of its own manufacture, and materials and supplies used in their manufacture and sale throughout a territory including 14 states and the District of Columbia.

Each applicant alleged in its application that its motor vehicle operations were not those of a common or contract carrier but constituted private carriage, and that the purpose of filing such applications was to secure a determination by the Commission of the question of whether it was a common carrier,[4] or a con-

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[2] 48 M.C.C. 259.

[3] 48 M.C.C. 405.

[4] Sec. 203 (a) (14) defines Common Carrier as follows:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class of classes thereof for compensation, whether over regular or irregular routes, * * *."

tract carrier,[5] or a private carrier,[6] as those terms are used in Section 203 (a) subsections (14), (15) and (17) of the Interstate Commerce Act (Title 49 U.S.C., Section 203 (14), (15) and (17)). That this is a correct method of securing a determination of their status is settled by *Schenley Distillers Corp.* v. *United States,* 326 U.S. 432.

Following hearings before Commission examiners, Division 5 issued its report and order in the Lenoir proceeding on May 27, 1948, and in Schenley proceeding on June 21, 1948, holding neither concern is a common or contract carrier but is a private carrier and the application in each case was ordered dismissed.

Petitions, filed by protestants, including some of appellants herein, requesting reconsideration by the entire Commission, resulted in the proceedings being reopened for oral argument only, and inasmuch as the cases presented similar issues they were heard together. Both cases were disposed of in one report which contained a reaffirmation of Division 5's finding that both Lenoir and Schenley are not common carriers or contract carriers but are private carriers and that the applications should be dismissed.

The facts in the case are not in dispute and the only

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[5] Sec. 203 (a) (15) defines contract carrier as follows:

"The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

[6] Sec. 203 (a) (17) defines private carrier as follows:

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

question involved is whether the Commission erred in finding that Lenoir and Schenley are not common carriers as defined in Section 203 (a) (14), or contract carriers as defined in Section 203 (a) (15), but private carriers as that term is defined in Section 203 (a) (17) of the Act (49 U.S.C., Sec. 303 (a) (14), (15) and (17)).

In the report by Division 5 of May 27, 1948, it was found that Lenoir is primarily engaged in the manufacture of furniture for the purpose of sale and that of an annual production of approximately $3,000,000 only 15 or 20 percent of the manufactured product is transported in its own trucks from the factory to its customers in various states, while the remainder is transported by rail and motor common carriers. Lenoir operates 5 trucks for this purpose. These vehicles also are used, whenever possible on return trips, for carrying supplies and materials used in the manufacture of the furniture. Sales are made f.o.b. factory, and when delivered in the company's trucks Lenoir adds to the factory price a charge comparable to rail or motor carrier rates, and shows this charge separately on the invoice. This charge, although not sufficient to cover the actual cost of transportation, serves the stated purpose of maintaining uniform delivered prices at destination whether the furniture moves in its vehicles or in those of for-hire carriers. Supplies and materials are usually purchased f.o.b. origins, although sometimes a freight allowance is made by the supplier. The use of its own vehicles in delivering the furniture is influenced in part by non-availability of for-hire carriage and the need for expeditious deliveries which fosters good will. As appellants concede (page 5 of Jurisdictional Statement), the company does not hold itself out to the general public as a common carrier and its services

are not available to anyone as a contract carrier (48 M.C.C. 259, 260-261).

In the report issued by Division 5 of June 21, 1948, in respect of the Schenley application, it was found that Schenley owns 32 tractor-trailer units employed in delivering one-half of one percent of finished liquor products of its own manufacture to customers in various states, the remainder being shipped by means of rail and motor carriers for hire. Schenley Distillers Corporation purchases the entire output of case liquor of its several subsidiaries which it sells to various purchasers. When delivery of liquor thus sold is transported in Schenley's own vehicles it is sold f.o.b. destination at the origin selling price plus a sum roughly equivalent to the rail rate from origin to destination. This method of recouping the transportation expenses makes the cost of the purchases uniform regardless of the method of transportation used. The remaining shipments are delivered to purchasers by rail and motor carriers at f.o.b. origin prices. On return trips the vehicles are used occasionally for transporting distillery supplies, (which are purchased f.o.b. origin, apparently by individual subsidiaries) at no cost to the subsidiary. No bills of lading are issued and no contract of transportation is made. The applicant does not hold itself out to transport as a common carrier nor are its services available as a contract carrier. The only transportation services rendered are in effecting delivery of liquor of which it is the owner and the occasional delivery of materials to its subsidiaries without charge. (48 M.C.C. 405, 407, 408, 411).

In its report on oral argument, dated November 8, 1949, the entire Commission sustained the holdings of Division 5 that Lenoir (48 M.C.C. 259, 246) and Schenley (48 M.C.C. 405, 411), respectively, are pri-

marily engaged in the sale and distribution of furniture and alcoholic liquors and that the motor operations of each are conducted as a bona fide incident to and in furtherance of their primary businesses and not for the purpose of profiting from the transportation as such (51 M.C.C. 65, 76).

Appellants contended before the Commission, as they did in the District Court, that the Commission erred in holding that Lenoir and Schenley are private carriers, as that term is defined in Section 203 (a) (17) of the Act (49 U.S.C., Sec. 303 (a) (17)), rather than common or contract carriers as those terms are defined in Section 203 (a) (14) and (15) (49 U.S.C., Sec. 203 (a) (14) and (15)),[7] and that in making the determination it was not proper for the Commission to apply the "primary business" or "purpose to profit" test as a criterion or standard for distinguishing between private and for-hire carriage. Further, that it was error for the Court to sustain the Commission's findings, that each of the applicants is a private carrier within the meaning of the Act, on the ground that the motor carrier operations are incidental to its primary noncarrier business, notwithstanding that each receives compensation for the transportation service performed by it.

Appellee submits that this appeal presents no substantial questions. The issue presented is whether a concern engaged in a non-trucking enterprise, including as here a manufacturing or mercantile business, may, without losing its status as a private carrier, directly or indirectly collect compensation for delivering goods to its customers, when such transportation is performed in furtherance of a primary business of manufacture or sale of goods.

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[7] See footnotes 4, 5 and 6, page 3, of this motion, for statutory definitions of these three types of carriers.

Section 203 (a) (17) of the Act (49 U.S.C. 303 (a) (17)) defines a private carrier as "any person not included in the terms 'common carrier . . . or contract carrier' . . . who or which transports . . . property of which such person is the owner, lessee, or bailee, *when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.*" (Emphasis added.)

Upon a consideration of all the facts and circumstances of operations performed by Lenoir and Schenley, the entire Commission, in upholding the prior decisions of Division 5 which had found by the application of the "primary business" test that each concern was a private carrier, restated and reaffirmed that test. The Commission said (51 M.C.C. 65, 75):

> We conclude that the principles announced by the division in the *Woitishek* case [8] are sound and consistent with the act and that, despite the simplicity or complexity of facts in any case, they afford an adequate basis or criteria for the determination of a carrier's status under the act. If the facts establish that the primary business of an operator is the supplying of transportation for compensation then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale. Numerous cases involving operations of this character could be cited. If, on the other hand, the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the trans-

[8] For reference to this holding (42 M.C.C. 193), see *infra*, p. 8.

portation performed. In our opinion, they cannot be both. A finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that the motor operations are conducted in bona fide furtherance of its other and primary commercial enterprise.

We do not mean that a private carrier may not under the law realize an incidental profit in the conduct of its motor carriage without forsaking or endangering its private carrier status. As the division stated in the *Woitishek* decision, each case must be determined on its own facts.

Applying the tests heretofore discussed to the facts of record in the considered cases, we conclude that the respective applicants are primarily engaged in the sale and distribution of alcoholic liquors and in manufacture of furniture and the motor operations of each are conducted as a bona fide incident to and in furtherance of their primary businesses and not for the purpose of profiting from the transportation as such.

The Commission has consistently applied the "primary business" of the operator test in determining the status of motor carriers. This test was used in the first case in which the question of carrier status was involved after motor carrier regulation became effective under the Act when the Commission, by Division 5, employed it in *Carpenter Common Carrier Application,* 2 M.C.C. 85 (1937). Since then the Commission has used this test in scores of other cases, sometimes rephrasing it, using different words such as "principal" or "real" or "regular" and "established" business of the operator and occasionally has stated it as whether the transportation "is performed with a purpose to profit from the transportation as such." *Woitishek Common Carrier Application,* 42 M.C.C.

193, 206 (1943).[9] All such statements are only paraphrases or restatements of the "primary business" test. The Supreme Court has held that great weight is to be attributed to the Commission's interpretation of the Act. *United States* v. *American Trucking Asso.*, 310 U.S. 534, 549; *Colgate Palmolive Peet Co.* v. *United States*, 320 U.S. 422, 426; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-89; *Levinson* v. *Spector Motor Co.*, 330 U.S. 649, 672.

The courts, with but a single exception, (*Interstate Commerce Commission* v. *Jamestown Sterling Corp.* (W.D. N.Y.), 64 F. Supp. 121—a decision by a district court as ordinarily constituted of one judge) have upheld the Commission's application of the "primary business" test as the criterion for distinguishing between for-hire and private carriage. *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155 (C.A. 10), cert. denied 317 U.S. 650, 707; *Interstate Commerce Commission* v. *Clayton*, 127 F. 2d 967 (C.A. 10); *Interstate Commerce Commission* v. *Tank Car Oil Corp.*, 151 F. 2d 834 (C.A. 5); and *Beggs* v. *Kroger Co.*, 167 F. 2d 700 (C.A. 8); *Schenley Distillers Corp.* v. *United States*, 61 F. Supp. 981 (Del.), affirmed 326 U.S. 432. In the *Schenley* case, the district court in commenting on the "primary business" test observed that in determining whether carriage is for hire or private carriage, "it was found helpful to determine whether the primary business was the supplying of

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[9] In the *Woitishek* case, after reviewing the authorities at length, the Commission stated (pp. 205-206):

> "After careful reconsideration of the entire subject, we are convinced that we should continue as in the past to determine all issues of for-hire versus private carriage on the basis of the operator's primary business. In so doing, we shall, of course, give appropriate consideration to the fact, when shown, that an operator receives compensation for transportation performed identifiable as such, but we do not think that such fact alone should be allowed to control our decisions. * * *."

transportation or whether the transportation was merely incidental" (61 F. Supp., at p. 981).

The legislative history of the Act supports the Commission's interpretation, that the primary business of the operator is the test to be applied in distinguishing between for-hire and private carriage.[10]

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[10] In the "hearings before the Committee on Interstate Commerce, U. S. Senate, 74th Cong., 1st Session on S. 1629" (Government Printing Office, Washington, 1935), page 86, the late Commissioner Joseph B. Eastman testified as follows in response to questions asked by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, as to whether the proposed bill to regulate motor carriers would regulate the transportation by owners of goods being transported to their customers:

> Mr. Eastman: Well, I was going to say that in instances where the trucker actually buys the products which he transports, if that is a bona fide transaction and is not merely a device to evade regulation, he would be a private carrier and be carrying his own property and there would not be any regulation of him under this bill. In fact, he would not charge any rates; he would be simply carrying his own property. However, if he is carrying for others, either as a common carrier or as a contract carrier, he would be subject to regulation under this bill. . . .
>
> The Chairman: He would not be exempted, as I understand it, unless he made his living in that particular way."

Representative Holmes, in explaining the effect of regulation proposed in the bill, and after quoting the definition of private carriers as finally enacted in Section 203 (a) (17), gave the following example of such carrier (Vol. 79, Congressional Record—House, Legislative Day July 31, 1935, page 12221):

> "Mr. Holmes: . . . In other words, the department stores in Washington that may sell a bill of goods to be delivered in Philadelphia, New Jersey, or Massachusetts, do not come under the provisions of this bill because they are private owners of motor vehicles.
>
> Mr. Hope: Suppose a department store in Washington owning a fleet of trucks and delivering their own merchandise, should deliver merchandise for another store; would they not be a contract carrier under those circumstances?
>
> Mr. Holmes: No, they are casual operators. They are not in business as common carriers or contract carriers."

The following is from the debate on the bill S. 2009, which later became the Transportation Act of 1940 (Public, 785—76th Cong.—3rd Sess.)—amending the Interstate Commerce Act, including

That Congress knew the Commission was employing the "primary business" test in distinguishing between common and contract carriage on the one hand and private carriage on the other hand, is revealed by reference, in the course of the hearings on the bill which ultimately became the Transportation Act of 1940, to a letter dated April 3, 1939, from Commissioner Eastman (on behalf of the Interstate Commerce Commission) to Representative Lea, Chairman of the House Committee on Interstate and Foreign Commerce.[11]

Of further significance is the fact that Congress amended the original act containing the definitions of

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amendments to the original wording of the common and contract carrier definitions (84 Cong. Rec. 5871, *et seq.*):

> "Mr. McKellar: To use the illustration I gave a while ago, if a private concern in Memphis, Tenn., desires to deliver its goods to the South, in Mississippi, or to the West, in Arkansas, it may do so without coming within the provisions of the bill?
>
> Mr. Wheeler: Exactly. The most attempted to be done—and that has not been done—is to try to regulate the safety conditions. There is a provision in the old law, which remains the same with respect to safety provisions. (84 Cong. Rec., pp. 6052-6053).
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> * * * * *
>
> Mr. Wheeler: I have tried to make it plain to the Senate, not once but 50 times, that, as a matter of fact, there is nothing in the bill which seeks to regulate private carriers, because in my judgment—and some members of the committee have disagreed with me—Congress does not possess the power to do so. If I owned a boat, for instance, and I was carrying my own cargo in it, and the Government said that I had to pay such and such charges for the freight that I carried for myself, it would simply result in my taking money out of one pocket and putting it into the other." (84 Cong. Rec., p. 6127).

[11] At page 6 of this letter, after quoting the private carrier definition, the Commission advised Congress as follows:

> "In that connection, question has arisen as to whether an industrial establishment which delivers its products to customers by its own trucks is a 'private carrier of property', if the price which the customer pays for the products includes an increment to cover the cost of this transportation. This question was considered by Division 5 of the Commission in *Congoleum-Nairn, Inc., Contract Carrier Application*, 2 M.C.C. 237, where a situation of that general character existed. It was

common, contract and private carriers and made certain changes with respect to common and contract carriers, yet left unchanged the private carrier definition. It did this notwithstanding its knowledge that the Commission was employing the primary business test in distinguishing between the three types of carriers.

The practice of private carriers of including in delivered prices an amount equivalent to rail freight rates or otherwise directly or indirectly collecting compensation for transporting their goods was considered by the Congress in the enactment of the Transportation Act of 1940. While the discussion was directed mainly to private carriage by water where the higher railroad rates were applied in fixing delivered prices it was noted that similar practices were observed by private carriers by motor vehicles.[12]

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there found that applicant was 'not engaged in the transportation of property' and that it was 'in no sense a carrier for hire in its motor-vehicle operations', since they were 'conducted by it as an integral part of its business of manufacturing and selling the commodities described.' Applicant was held to be, 'in these motor-vehicle operations, incidental to its principal business * * * a private carrier within the terms of the above definition.'"

Senate 1939 Hearings, page 765, also House Hearings, page 1557, et seq.

[12] In the debate on the bill contained in 84th Congressional Record, page 5951 (Senate), May 23, 1939, the following colloquy occurred:

"Mr. Wheeler * * * I understand that one company ships automobiles and parts through the Panama Canal and up to Los Angeles. They charge for the automobile, however, the Detroit price f.o.b. freight to Los Angeles. * * *.

Mr. McCarran: Mr. President, if I may interrupt, the same thing is true with reference to the caravan system. In other words, the automobile companies run caravans of automobiles across the country, but the purchaser is charged the freight rate."

At page 6137, Congressional Record, 84th Congress, May 25, 1939, Senator Wheeler again referred to this subject, as follows:

"* * * The oil companies ship crude oil by truck into Montana, and claim they can ship it cheaper than by rail,

The Commission considered and rejected appellees' contention that compensation in any form for transportation services provided by a transporter of goods makes him a for-hire carrier subject to regulation under the Act.[13]

Appellants contend, page 14 of their Jurisdictional Statement, that the private carrier definition intended to exclude all other carriers who receive compensation for transportation of property which they own or

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and refine it into gasoline in the State. They produce the crude oil in the oil fields, ship it to the refinery in Montana and turn out gasoline; and what do they charge the consumers in Montana for it? They charge them for gasoline the price in the Oklahoma fields plus the railroad freight rate to Montana, when it is refined in Montana * * *."

In order to prevent the practice of private carriers from delivering their own goods to customers at a delivered price which includes a transportation charge, Senator Shipstead introduced an amendment to the Transportation Act of 1940, which would have the effect of amending the Federal Trade Commission Act, which amendment provided as follows (84th Congressional Record 6122, Senate May 25, 1939):

> "For the purposes of this act it shall be deemed to be an unfair or deceptive act or practice in commerce for any person, partnership, or corporation to so fix the price at point of destination of any goods or commodities transported in commerce, that such price includes a charge for transportation, based upon railroad rates, for any part of the transportation of such goods or commodities which was not conducted by railroad."

This amendment was rejected by the Senate. Still another attempt was made in Congress, when the Transportation Act of 1940 was under consideration, to preclude any carrier (common, contract or private) from transporting goods which it produced, or in which it had any "interest, direct or indirect, legal or equitable, except such articles or commodities as may be necessary or intended for use in the conduct of the carrier business of such carrier." This so-called "Commodities Clause" was considered "far too drastic" and the "subcommittee" to which the measure was referred decided against any change in the existing clause which applied only to railroads. (Senate Report No. 433, 76th Congress, 1st Session, page 16).

[13] "The *Woitishek* decision considered and properly rejected the argument advanced herein, that a finding of for-hire carriage is warranted when the difference between the cost of the article at

transport in furtherance of any commercial enterprise and that it was the intent of Congress to classify all carriers receiving compensation, direct or indirect, as common or contract carriers. Thus, they insist that compensation is the test. This same contention was made before the Commission and the District Court and was rejected by each tribunal. The fallacy of this contention is ably pointed out by the District Court in its opinion.[14]

In the light of the facts in the case at bar, the District Court's holding is amply sustained by the cases cited in its opinion. These authorities, together with the legislative history, also referred to in the opinion, demonstrate that Congress intended the "primary business" test as the criterion for distinguishing be-

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point of origin and the selling price at destination varies in direct proportion to the distance such article is transported. We do not believe that Congress intended that any concern which operates its own motor vehicles in bona fide furtherance of its noncarrier primary business must operate such vehicles without compensation or on a strict recovery of cost basis, or that the cost of transportation furnished should be spread equally over all output by the establishment of a factory price which would in every case include delivery regardless of whether any transportation service was furnished. Even the for-hire carriers recognize that all private carriers must in some manner compensate themselves for or recover the costs of their motor operations, but they contend that the compensation should be included in the over-all costs, which, with a figure for profit, make up the selling price at origin and that all deliveries, regardless of the distance involved, should be accomplished without any addition to the factory or origin price. We see no statutory basis for this argument or for the argument that a private carrier may not conduct motor operations without acquiring a for-hire carrier status unless it be established that such operations are necessary to the conduct of its primary business."

[14] With respect to this contention the Court stated:

> "Counsel for plaintiffs here point out that under the statutory definitions one is a private carrier only if one is 'not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle." This is true, and equally true is it that the term 'compensation' is found only in the statutory definitions of common carrier and contract carrier, not in the definition of private carrier. But it does not follow, as plaintiffs contend, that wherever compensation, direct or indirect,

tween for-hire and private carriage. It is also clear from those authorities and the legislative history that Congress never intended to prohibit a concern which transports in its own trucks, goods sold by it, from directly or indirectly collecting compensation for transporting these goods, or that such a concern was to be considered as a for-hire carrier and subject to regulation, when such transportation is in *bona fide* furtherance of a non-transportation service.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General,
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DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

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is found, the carrier is (with only those exceptions made express in the Act) a common carrier or a contract carrier."

Plaintiffs are here attributing to the term 'compensation' a mystical significance which the term does not possess. There are fallacies in this connection even if resort be had, as plaintiffs wish, to mere mechanical logic and a purely analytical interpretation of the terms used in the statutory definitions. Thus, the clause 'when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise' appears (a) in the definition of private carrier, but not (b) in the other two definitions, common carrier and contract carrier. Accordingly, by this same logic, the basic difference between (on the one hand) common carriers and contract carriers and (on the other hand) private carriers, is whether or not the 'transportation is for the purpose of sales, lease, rent or bailment, or in furtherance of any commerical enterprise.' Possibly, this confused thinking of plaintiffs may be due somewhat to the fact that at common law, the common carrier of goods must carry for a compensation. See Dobie, Bailments and Carrier, 296, 300, 304." 93 F. Supp. 517, 524.

We concur in the above motion to dismiss or affirm filed by the United States and the Interstate Commerce Commission.

JOHN S. BURCHMORE,
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WILLIAM A. QUINLAN,
For National Council of Private Motor Truck Owners, Inc.

JOSEPH E. KELLER,
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For Lenoir Chair Company.

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No. 517. BROOKS TRANSPORTATION CO., INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Virginia. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *John T. Grigsby, Walter L. Baumgartner* and *Albert B. Rosenbaum* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; and *Charles Pickett* for Schenley Industries, Inc., appellees. Reported below: 93 F. Supp. 517.